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IN THE

Supreme Court of the United States

October Term, 1965

No. 1198

STATE OF WEST VIRGINIA, EX REL. G. THOMAS BATTLE, STATE TAX COMMISSIONER,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a corporation,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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No. _____

STATE OF WEST VIRGINIA, EX REL.
G. THOMAS BATTLE, STATE TAX
COMMISSIONER,
Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, a corporation,
Respondent.

**Petition for a Writ of Certiorari
to the Supreme Court of Appeals
of the State of West Virginia**

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of the State of West Virginia entered in the above case on November 8, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Kanawha County, State of West Virginia (R-pp. 275-290) is unreported and is printed in App. B hereto, infra. The opinion of the Supreme Court of Appeals of West Virginia (R-pp. 371-420) printed in App. A hereto, infra, is reported in 149 W. Va. 810, 143 S.E. 2d 331 (1965).

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia was filed July 20, 1965 (R-pp. 369-370) App. A hereto, infra. Petition for rehearing was denied November 8, 1965 (R-pp. 421-422) and judgment became final on that date. Orders extending the time within which to file a petition for writ of certiorari to March 9, 1966 and to April 7, 1966, were signed by Justice William Brennan, Jr. of this Court on February 7, 1966 and March 7, 1966, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

The State of West Virginia has a privilege tax for the privilege of doing business in the state which is set forth in Chapter 11, Article 12A of the Code of West Virginia of 1931, as amended. The single privilege tax, as applicable to railroad corporations, is set forth in two different sections of the said Chapter 11, Article 12A, and being Sections 2 and 5(b), which two sections constitute the normal tax against which certain credits are allowed.

That portion of the single privilege as taxed under Section 2 and measured by a property assessment is not in issue. What is in issue is that portion of the single privilege as taxed under Section 5(b) on the net income of a railroad corporation as measured by an allocation formula, which allocation formula when applied to the net income of a railroad corporation engaging in both intrastate and interstate business activities and having mixed or composite net income from such business activities, necessarily includes within the measure of the tax that portion of the interstate net income earned within the boundaries of the State of West Virginia, as well as the intrastate net income earned within such boundaries.

The question presented, then, is whether the State of West Virginia, under a privilege tax for doing business within the state, may tax the mixed net income of a railroad corporation engaging in both intrastate and interstate business activities in West Virginia, and by an allocation formula, include within the measure of such tax the intrastate net income and that portion of the interstate net income earned within the boundaries of West Virginia without violating the Commerce Clause of the United States Constitution because unduly burdening interstate commerce.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions involved are:

(a) U. S. Constitution:
Art. I, Section 8, Clause 3, the Commerce Clause (referred to hereinafter as the "Commerce Clause")

(b) West Virginia Statutes:

Chapter 11, Article 12A, Privilege Tax on Certain Carrier Corporations

Section 1.
Section 2.
Section 5.
Section 5b.
Section 6.
Section 9.

They are printed in Appendix C, infra.

STATEMENT

1. Procedural History.

A declaratory judgment proceeding was instituted by the petitioner, as plaintiff, in the Circuit Court of Kanawha County, West Virginia, on February 24, 1960, after written notice given by the respondent, The Baltimore and Ohio Railroad Company, a corporation, to the petitioner, requesting him to institute such proceeding as provided by Section 2a, Article 1, Chapter 11, Code, 1931, as amended, to determine whether the respondent was entitled to a refund from the petitioner for the alleged overpayment of privilege taxes assessed against the defendant for the years 1952, 1953 and 1954 under the provisions of Section 5, Article 12A, Chapter 11, Code, 1931, as amended, following the refusal by the State Tax Commissioner to grant a petition for a refund of such taxes filed by the respondent on October 15, 1956.

Petitioner had required the railroad company to include in its net income all income from all sources when paying its transportation privilege taxes to the

State and did not distinguish between transportation and nontransportation income; had treated the income as reported by the respondent for the years in question as income from, related to, or in furtherance of the railroad business; and stated the defendant was precluded from recovering sums paid for the year 1952 because its petition for refund was not filed within three years from the date of payment, as required by Section 2a, Article 1, Chapter 11, Code, 1931, as amended. App. A, pp. 1, 2.

In such declaratory judgment proceeding, the respondent filed an answer in which it made certain defenses as to the state questions, not pertinent here, and further alleged that the statute in question imposed a burden upon interstate commerce in violation of the Constitution of the United States. (Federal question first raised here). The prayer of the answer was that the respondent be granted a refund in the amount of $339,332.51 or in the alternative in the amount of $314,872.37.

The case was submitted for decision in the Circuit Court of Kanawha County, West Virginia upon the foregoing pleadings and depositions, in behalf of the petitioner, of representatives of the respondent and the exhibits filed with the depositions ,and by its final judgment rendered March 11, 1964, accompanied by its written opinion which is filed as part of the record in the proceeding, the Circuit Court, after making certain findings of fact, held that the privilege tax imposed upon the respondent by the statute, as applied by the State Tax Commissioner, did not violate Article 1, Section 8, the Commerce Clause, of the Constitution of the United States. (R-pp. 275-290) App. B,

infra. By its final order (R-pp. 268-274) App. B, infra, the Circuit Court required the petitioner to refund to the respondent the sum of $187,460.13 and rendered final judgment to that effect, after holding in petitioner's favor on the interstate commerce question.

From that judgment, the Supreme Court of Appeals of West Virginia granted an appeal upon the application of the petitioner with respect to two state questions and also granted an appeal upon the application of the respondent with respect to the judgment of the Circuit Court on the federal question in holding that the tax imposed by Section 5(b), Article 12A, Chapter 11, Code, 1931, as amended, did not violate Article 1, Section 8, the Commerce Clause, of the Constitution of the United States as a tax upon the interstate business of the respondent and in respect to one state question. The two appeals, by agreement of the parties and the consent of the Supreme Court of Appeals of West Virginia were consolidated and the questions involved were presented and submitted together for decision upon the written briefs and the oral arguments of the attorneys for the respective parties.

On July 20, 1965, the Supreme Court of Appeals of West Virginia filed its opinion reversing the decision of the Circuit Court of Kanawha County, West Virginia and holding that the tax under Chapter 11, Article 12A, Section 5(b) of the Code of West Virginia of 1931, as amended, to the extent that it applied to any of the interstate net income of the respondent, violated the Commerce Clause as an undue burden. (R-pp. 33, 35) App. A, infra.

Thereafter, on November 8, 1965, the Supreme Court of Appeals of West Virginia denied petitioner's request for rehearing. (R-pp. 421-422).

2. How Federal Question Is Presented.

The federal question sought to be reviewed was first raised by respondent in its pleading (Answer) filed in the trial court and passed upon by the trial judge in his memo of opinion (R-pp. 275-290) App. B, infra, and order (R-pp. 268-274) App. B, infra.

The federal question was briefed and argued in the Supreme Court of Appeals of West Virginia and the opinion held the state statute violated the Commerce Clause to the extent that any interstate net income of the respondent was included in the measure of the allocation formula contained in Chapter 11, Article 12A, Section 5(b) of the Code of West Virginia of 1931, as amended. (R-pp. 33, 35) App. A, infra.

3. Facts Material To The Question Presented.

The respondent is a corporation organized under the laws of the State of Maryland and is engaged in the railroad transportation of passengers and freight in the State of West Virginia. During the years 1952, 1953 and 1954 the railway system which it operated extended from New York City and Philadelphia in the east to Chicago and St. Louis in the west and from Rochester, Buffalo, Cleveland, Toledo and Detroit in the north to Charleston, Huntington, Louisville and Cincinnati in the south. Its railway facilities were used and its equipment and offices were located in twelve states and the District of Columbia, with its principal offices in the City of Baltimore, Maryland. As an interstate carrier it was subject to regulation by the Interstate Commerce Commission. During the years 1952, 1953 and 1954, a large amount of coal

traffic carried by the defendant originated in West Virginia and was transported to other states. A large majority of the ton-miles carried by the respondent in West Virginia either originated outside West Virginia and passed through West Virginia to other states or originated in West Virginia and was carried to other states. All of this traffic constituted interstate commerce. It also engaged in intrastate traffic which originated and terminated in West Virginia, the amount of intrastate traffic being small in comparison to the amount of its interstate traffic. [For actual amounts see (R-pp. 379, 380, 407) App. A, infra.]

REASONS FOR GRANTING THE WRIT

1. The tax in question is a privilege tax for the privilege of doing business in the State of West Virginia. It is a tax against the net income of railroad corporations measured by ascertaining a sum bearing the portion to total net income of the corporation that its business done in West Virginia, measured in ton miles, bears to all business done, measured in like fashion. (Chapter 11, Article 12A, Section 5(b), App. C, infra.) The Supreme Court of Appeals of West Virginia, in holding that such tax violates the Commerce Clause to the extent that it includes within its measure that portion of interstate net income earned within the boundaries of West Virginia by a railroad corporation, is directly in conflict with the recent and pertinent decisions of this Court which has often held that a state privilege or net income tax may be imposed upon income derived from a combination of intrastate, interstate, and foreign commerce and such a tax does not burden interstate commerce although enhanced by

income derived from interstate commerce within the boundaries of the taxing state. *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951); *Western Livestock* v. *Bureau of Revenue*, 303 U. S. 250 (1938); *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920); *Matson Navigation Co.* v. *State Board of Equalization*, 297 U. S. 441 (1936); *North-Western States Portland Cement Company* v. *Minnesota*, 358 U. S. 450 (1959); *General Motors Corporation* v. *Washington*, 377 U. S. 436 (1964); *Canton R. Co.* v. *Rogan*, 340 U. S. 520 (1951); *Western Maryland R. Co.* v. *Rogan*, 340 U. S. 520 (1951); *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (1891).

The Supreme Court of Appeals of West Virginia in its opinion of July 20, 1965, found that "a privilege tax imposed by the State upon such composite net income from intrastate and interstate commerce is an unreasonable burden upon interstate commerce in violation of Article I, Section 8, the Commerce Clause, of the Constitution of the United States, and to the extent that such tax is applied to the net income from interstate commerce it is an invalid tax." (R-p. 409) App. A, infra.

Such Court found the following facts upon which to support the above conclusion:

> "During the years in question the number of ton-miles of the intrastate freight traffic of the defendant in West Virginia was 101,999,415 for 1952; 102,033,940 for 1953 and 87,936,945 for 1954. * * * The total ton-miles of the intrastate and interstate traffic in West Virginia for

1952 was 7,561,310,000 and the ratio of such traffic to the overall total ton-miles of the defendant was approximately 27.38% for 1952; the total ton-miles of intrastate and interstate traffic in West Virginia for 1953 was 7,611,437,180 and the ratio of such traffic to the total overall ton-miles of the defendant was approximately 27.13% for 1953; and the total ton-miles of the intrastate and interstate traffic in West Virginia for 1954 was 6,633,098,121 and the ratio of such traffic to the overall total ton-miles of the defendant was approximately 27.94% for 1954. * * *" (R-pp. 379, 380) App. A, infra.

Based upon these facts, the Court found that the railroad did both intrastate and interstate business and that approximately 27% of the total transportation business, both intrastate and interstate, of the Baltimore & Ohio Railroad was done in the State of West Virginia.

Probably the leading case in this line of cases and the one which controls the case at bar is the case of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951). This Court found the facts as follows:

"Petitioner, Spector Motor Service, Inc., is a Missouri corporation engaged *exclusively* in interstate trucking. It instituted this action in 1942 in the United States District Court for the District of Connecticut against the Tax Commissioner of that State. It sought to enjoin collection of assessments and penalties totaling $7,795.50, which had been levied against it, for various periods between June 1, 1935, and December 31, 1940, under the Connecticut Corpo-

> ration Business Tax Act of 1935 and amendments thereto. It asked also for a declaratory judgment as to its liability, if any, under that Act. It claimed that the tax imposed by the Act did not apply to it and that, if it did, such application violated both the Connecticut Constitution and the Commerce and Due Process Clauses of the United States Constitution. * * *" (Emphasis supplied) 340 U. S. 602.

This Court distinguished this case and found that the State of Connecticut could not impose the tax upon a foreign corporation engaged exclusively in interstate commerce. The Court found:

> "The incidence of the tax is upon *no intrastate commerce activities because there are none.* Petitioner is engaged *only* in interstate transportation. Its principal place of business is in Illinois. It is authorized by the Interstate Commerce Commission to do certain interstate trucking and by the Connecticut Public Utilities Commission to do part of such interstate trucking in Connecticut. Petitioner has filed with the Secretary of State of Connecticut a certificate of its incorporation in Missouri, has designated an agent in Connecticut for service of process and has paid the state fee required in that connection. It has not been authorized by the State of Connecticut to do intrastate trucking and does not engage in it. See *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 254. (Emphasis supplied)

This Court in setting forth the distinctions presented in the commerce clause points out the reason for its decision by stating that:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon

the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Massachusetts, 268 US 203, 69 L ed 916, 45 S Ct 477, 44 ALR 1219 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 US 555, 69 L ed 439, 45 S Ct 184 (measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 US 662, 669 et seq., 93 L ed 1613, 1621, 69 S Ct 1264 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Stevedoring Co. 330 US 422, 91 L ed 993, 67 S Ct 815; Freeman v. Hewit, 329 US 249, 91 L ed 265, 67 S Ct 274, supra."

This Court then stated that where a corporation is engaged in both intrastate and interstate commerce, a state may tax the privilege of engaging in intrastate business by using a proportion of the total business of the corporation even though some of the receipts or a large portion of the receipts were received from interstate business. The Court stated:

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, 337 US 662, 93 L ed 1613, 69 S Ct 1264, supra; International

Harvester Co. v. Evatt, 329 US 416, 91 L ed 390, 67 S Ct 444; Atlantic Lumber Co. v. Commissioner of Corporations & Taxation, 298 US 553, 80 L ed 1328, 56 S Ct 887. The same is true where the taxpayer's business activity is local in nature, such as the transportation of passengers between points within the same state, although including interstate travel, Central Greyhound Lines v. Mealey, 334 US 653, 92 L ed 1633, 68 S Ct 1260, or the publication of a newspaper, Western Live Stock v. Bureau of Revenue, 303 US 250, 82 L ed 823, 58 S Ct 546, 115 ALR 944. See also Memphis Gas Co. v. Stone, 335 US 80, 92 L ed 1832, 68 S Ct 1475.

The decision of this Court in the *Spector* case, *supra*, is very pertinent in that the dissenting opinion as expressed by Justice Clark, who is joined by Justice Black and Justice Douglas, points out that the majority opinion draws too fine a line and that even a corporation engaged in *exclusively interstate business* should be made to pay its way even if there is no local taxing incident. The dissent states further its proposition as follows:

> "The Court assumes, and I think it has been clearly demonstrated, that the tax under challenge is nondiscriminatory, fairly apportioned and not an undue burden on interstate commerce. Hence, *if appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate,'* Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce." (Emphasis supplied.)

The dissent, in explaining clearly why it does not agree but feels that the rule should be even more liberal, holds:

> "But solely because Spector engages in what the Court calls 'exclusively interstate' business, a different standard is applied. The Court does not ask whether the State is merely asking interstate commerce to pay its way, or whether the State in fact provides protection and services for which such commerce may fairly be charged. Nor is the Court concerned whether the tax puts interstate business at a competitive disadvantage or is likely to do so. Instead, the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one for the use of highways or in lieu of an ad valorem property tax, Spector would have had to pay the same amount, calculated in the same way, as is sought to be collected here. In acknowledging this, the Court's own opinion totally refutes its protestation that the standard employed to strike down Connecticut's tax is more than a matter of labels. Spector remains free—as it has since the tax law was adopted in 1935—from paying any share of the State's expenses, and its tax-free status continues until Connecticut renames or reshuffles its tax."

The dissent of Justice Clark goes even farther and states that the fact that a corporation is exclusively interstate should have no bearing. He states:

> "Neither such a standard nor such a result persuades me. I agree with the well-reasoned

opinions of the court below that the cases upholding fairly apportioned taxes on mixed intrastate and interstate business, and recognizing the right of states to make interstate commerce pay its way, have enfeebled—and justifiably so—the precedents which today's decision restores to full vigor. In the not too distant past, this seemed to be quite clear. In *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 86 L. ed 1090, 62 S Ct 857 (1942), a tax was upheld as being reasonably attributable to intrastate activities. But Chief Justice Stone, speaking for a unanimous Court, went further to state:

> " 'In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, . . ., or upon net income derived from within the state, . . ., is not prohibited by the Commerce clause . . . .' *Id.* at 656."

"In light of the apparent need for clearing up the tangled underbrush of past cases, it appears that this view was delivered advisedly. Nor do I understand it to have been upset by Freeman v. Hewit, 329 U. S. 249 (1946), or Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947). The former involved a gross-receipts tax capable of duplication by another state; the latter involved a gross-receipts tax rather than a net-income tax; and the opinion in each case was written by a member of the Court who joined in the Beeler decision.

"But in any event, I would confine those decisions to their 'special facts.' Freeman v. Hewit, supra at 252. The Connecticut tax meets every practical test of fairness and propriety enunci-

ated in cases upholding privilege taxes on corporations doing a mixed intrastate and interstate business. These cases should govern here, for there is no apparent difference between an 'exclusively' interstate business and a 'mixed' business which would warrant different constitutional regard. There is nothing spiritual about interstate commerce. It is rarely devoid of significant contacts with the several states. Hence, this Court has long treated the problems in this field with a flexibility which the competing demands of federal and state governmental spheres have required. * * *"

In finding what the dissentor believes to be sufficient "local taxing incidents," the Court, in its dissent, finds:

"A similar recognition of facts is no less suited to this case. Spector qualified to do business in the State on June 11, 1934, by filing the necessary papers with the Secretary of State. It leases and utilizes terminals in Connecticut. It employs twenty-seven fulltime workers in Connecticut, the payroll at New Britain amounting to $1,200 per week. It owns pickup trucks which are registered in its name with the State Motor Vehicle Department and which ply the streets of Connecticut cities. It uses heavy trucks which grind over Connecticut highways. As pointed out by the Connecticut Supreme Court of Errors, its leaseholds

"'. . . were the means adopted by it for the successful operation of its business in this state, and no doubt they were of material service in producing the large proportion of the plaintiff's business which is attributable to Connecticut.' Spector Motor Service, Inc. v. Walsh, 135 Conn. 37, 50 (1948).

> "To be sure, the company does not make intrastate deliveries. But if it did, its activities would differ only in that its trucks might use different streets and highways and make different stops; the protection and services rendered by the State would be the same. The local aspects of Spector's business, even though it might technically be 'exclusively interstate,' are easily as substantial as those which this Court recently found adequate to uphold parts of the Illinois occupation tax, Norton Co. v. Department of Revenue, 340 U. S. 534 (1951). They are at least as extensive as those which validated a 'privilege' tax in Memphis Natural Gas Co. v. Stone, 335 U. S. 80 (1948)."

In Western Live Stock, et al. v. Bureau of Revenue, et al., 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed 823 (1937), this Court held that gross receipts from the sale of advertising by interstate contract, for inclusion in a locally published periodical circulated both intrastate and interstate, may be included in the measure of a privilege tax. The Court in setting forth what has been settled law for a number of years, stated as follows:

> "We turn to the other and more vexed question, whether the tax is invalid because the performance of the contract, for which the compensation is paid, involves to some extent the distribution, interstate, of some copies of the magazine containing the advertisements. We lay to one side the fact that appellants do not allege specifically that the contract stipulates that the advertisements shall be sent to subscribers out of the state, or is so framed that the compensation would not be earned if subscribers outside the state should cancel their subscriptions. We

assume the point in appellants' favor and address ourselves to their argument that *the present tax infringes the commerce clause because it is measured by gross receipts which are to some extent augmented by appellants' maintenance of an interstate circulation of their magazine.* (Emphasis supplied)

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden *even though it increases the cost of doing the business.* 'Even interstate business must pay its way,' (citations omitted), and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, (citations omitted), and if the property devoted to interstate transportation is used both within and without the state a tax fairly apportioned to its use within the state will be sustained. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 11 S. Ct. 876, 3 Inters. Com. Rep. 595; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 62 L. ed. 827, 38 S. Ct. 373. Net earnings from interstate commerce are subject to income tax, United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918E, 748, *and if the commerce is carried on by a corporation a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment.* Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45; cf. Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271,

69 L. ed. 282, 45 S. Ct. 82. (Emphasis supplied)

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citations omitted) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra (122 U. S. 346, 30 L. ed. 1205, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308); State Freight Tax Case, 15 Wall. 232, 280, 21 L. ed. 146, 163; Bradley, J., dissenting in Maine v. Grand Trunk R. Co. 142 U. S. 217, 235, 35 L. ed. 994, 997, 12 S. Ct. 121, 163, 3 Inters. Com. Rep. 809; cf. Pullman's Palace Car Co. v. Pennsylvania, supra, 141 U. S. 26, 35 L. ed. 617, 11 S. Ct. 876, 3 Inters. Com. Rep. 595. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. Baldwin v. G. A. F. Seelig, 294 U. S. 511, 523, 79 L. ed. 1032, 1038, 55 S. Ct. 497, 101 A.L.R. 55."

"Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state, Wisconsin & M. R. Co.

v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 S. Ct. 107; Maine v. Grand Truck R. Co. 142 U. S. 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. Rep. 807, supra; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 62 L. ed. 827, 38 S. Ct. 373, supra; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 S. Ct. 211, and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51, supra; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638, supra; Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218, supra, with which compare Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 S. Ct. 107, supra. Whether the tax was sustained as a fair means of measuring a local privilege or franchise, as in Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 12 S. Ct. 121, 163, 3 Inters. Com. Rep. 807, supra; Ficklen v. Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 12 S. Ct. 810, 4 Inters. Com. Rep. 79, supra; American Mfg. Co. v. St. Louis, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522, or as a method of arriving at the fair measure of a tax substituted for local property taxes, Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 62 L. ed. 827, 38 S. Ct. 73, supra; United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 S. Ct. 211, supra; cf. Postal Teleg.-Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 15 S. Ct. 268, 360, 5 Inters. Com. Rep. 1, supra; see McHenry v. Alford, 168 U. S. 651, 670, 671, 42 L. ed. 614, 621, 622, 18 S. Ct. 242, it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would

be subject if *gross receipts, unapportioned*, could be made the measure of a tax laid in every state where the commerce is carried on. A tax on gross receipts from tolls for the use by interstate trains of tracks lying wholly within the taxing state is valid, New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 S. Ct. 896; cf. Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. ed. 953, 17 S. Ct. 532, although a like tax on gross receipts from the rental of railroad cars used in interstate commerce both within and without the taxing state is invalid. Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51, supra. In the one case *the tax reaches only that part of the commerce carried on within the taxing state;* in the other it extends to the commerce carried on without the state boundaries, and, if valid, could be similarly laid in every other state in which the business in conducted." (Emphasis Supplied)

In the case of *Underwood Typewriter Company* v. *Chamberlain*, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920), this Court found that the Underwood Typewriter Company was a Delaware corporation operating in the State of Connecticut. The Court found the tax imposed as follows:

"Connecticut established in 1915 a comprehensive system of taxation applicable alike to all foreign and domestic corporations carrying on business within the state. This system prescribes practically the only method by which such corporations are taxed, other than the general property tax to which all property located within the state, whether the owner be a resident or a nonresident, an individual or a corporation, is subject. The act divides busi-

ness corporations into four classes, and the several classes are taxed by somewhat different methods. The fourth class, 'miscellaneous corporations,' includes, among others, manufacturing and trading companies, and with these alone are we concerned here. Upon their net income earned during the preceding year from business carried on within the state a tax of 2 per cent is imposed annually. The amount of the net income is ascertained by reference to the income upon which the corporation is required to pay a tax to the United States. If the company carries on business also outside the state of Connecticut, the proportion of its net income earned from business carried on within the state is ascertained by apportionment in the following manner: The corporation is required to state in its annual return to the tax commissioner from what general source its profits are principally derived. If the company's net profits are derived principally from ownership, sale, or rental of real property, or from the sale or use of tangible personal property, the tax is imposed on such proportion of the whole net income as the fair cash value of the real and the tangible personal property within the state bears to the fair cash value of all the real and tangible personal property of the company. *If the net profits of the company are derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the state bear to the total gross receipts of the company.* * * *" (Emphasis supplied) 254 U. S. 113.

The history of the case as found by this Court was as follows:

"The Underwood Typewriter Company is engaged in the business of manufacturing

typewriters and kindred articles; in selling its product and also certain accessories and supplies which it purchases; and in repairing and renting such machines. Its main office is in New York City. All its manufacturing is done in Connecticut. It has branch offices in other states for the sale, lease, and repair of machines and the sale of supplies; and it has one such branch office in Connecticut. All articles made by it—and some which it purchases—are stored in Connecticut until shipped direct to the branch offices, purchasers, or lessees. In its return to the tax commissioner of Connecticut, made in 1916, under the above law, the company declared that its net profits during the preceding year had been derived principally from tangible personal property; that these profits amounted to $1,336,586.13; that the fair cash value of the real estate and tangible personal property in Connecticut was $2,977,827.67, and the fair cash value of the real estate and tangible personal property outside that state was $3,343,-155.11. The proportion of the real estate and tangible personal property within the state was thus 47 per cent. The tax commissioner apportioned that percentage of the net profits, namely $629,668.50, as having been earned from the business done within the state and assessed thereon a tax of $12,593.37, being at the rate of 2 per cent. The company, having paid the tax under protest, brought this action in the Superior Court for the County of Hartford to recover the whole amount."

The United States Supreme Court was presented with three contentions by the company, one of which applies directly to the case at hand. The first contention was answered by this Court in the following language:

"First. It is contended that the tax burdens interstate commerce, and hence is void under § 8 of article 1 of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 364, 59 L. ed. 265, 272, 35 Sup. Ct. Rep. 99; Atlantic & P. Teleg. Co. v. Philadelphia, 190 U. S. 160, 163, 47 L. ed. 995, 999, 23 Sup. Ct. Rep. 817. The statute is, therefore, not open to the objection that it compels the company to pay for the privileges of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the state. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 695, 39 L. ed. 311, 315, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. This tax is based upon the net profits earned within the state. *That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled.* United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. ed. 1135, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 Sup. Ct. Rep. 221; compare William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause." (Emphasis supplied)

It should be pointed out to the Court that under the facts of the above case, the Underwood Typewriter Company was a foreign corporation doing an intra-

state and interstate business, the same situation as the Baltimore & Ohio Railroad in West Virginia.

In *Matson Navigation Company, et al. v. State Board of Equalization*, 297 U. S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936), this Court found the taxing statute to be as follows:

> "The California Bank and Franchise Tax Act declares: Every business corporation, with exceptions not here material, 'shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income' to be computed at the rate of four per cent upon that income for the preceding year. § 4. If all the corporation's business is done in California, the tax shall be computed on its entire net income; if not, on that portion which is derived from business done within the State. § 10. Net income is the revenue from all sources less expenses, losses, bad debts, taxes, depreciation, depletion, etc. §§ 6, 7 and 8."

The contentions of the Matson Navigation Company were found by this Court to be as follows:

> "Appellants were incorporated under the laws of California and, for purposes of taxation, are deemed affiliated. § 14. Matson Navigation Company and the Oceanic Steamship Company, in addition to doing substantial intrastate business in California, were engaged in transportation between ports on the Pacific coast in the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. The Matson Terminals, Inc., had no 1930 net income from interstate or foreign commerce. In March, 1931, appellants made a consolidated return

> showing for 1930 net income from intrastate business of $730,357.81 and from interstate and foreign business of $2,526,148.22. They maintained that the tax should not be more than four per cent of their net income from intrastate business. But the tax commissioner held that there should be included in the computation the part of their net income from interstate and foreign commerce that was attributable to California, found to be 22.2%, and on that basis be assessed an additional tax. The state board of equalization sustained the additional assessment. * * *"

The question as presented was without deviation the same question presented in the case at bar. The question as found by this Court was:

> "The only question here is whether consistently with these constitutional provisions there may be included in the base, to which the rate of four per cent was applied, any part of net income derived from appellants' interstate and foreign commerce."

This Court in answering the question as presented above stated:

> "* * * Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on which to compute the value of that use. Cf. Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 83. * * *"

The Court in elaborating upon the status of the law concerning this point in 1936 held:

"* * * Our decisions demonstrate that a state tax on *gross earnings* derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause. Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308; Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638; Meyer v. Wells, F. & Co. 223 U. S. 298, 300, 56 L. ed. 445, 447, 32 S. Ct. 218; New Jersey Bell Teleph. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 346, 74 L. ed. 463, 467, 50 S. Ct. 111, Cf. Pullman Co. v. Richardson, 261 U. S. 330, 338, 67 L. ed. 682, 686, 43 S. Ct. 366. They also definitely show that a State may tax net income derived from a domestic corporation's business—intrastate, interstate and foreign. United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748; Shaffer v. Carter, 252 U. S. 37, 57, 64 L. ed. 445, 458, 40 S. Ct. 221; Atlantic Coast Line R. Co. v. Daughton, 262 U. S. 413, 420, 422, 67 L. ed. 1051, 1059, 1060, 43 S. Ct. 620. Cf. William E. Peck & Co. v. Lowe, 247 U. S. 165, 62 L. ed. 1049, 38 S. Ct. 432; National Paper & Type Co. v. Bowers, 266 U. S. 373, 377, 69 L. ed. 331, 333, 45 S. Ct. 133. And net income justly attributable to all classes of business done within the State may be used as the measure of a tax imposed to pay the State for the use therein of the corporate franchises granted by it. Bass, Ratliff & Gretton v. State Tax Commission, 266 U. S. 271, 277, 69 L. ed. 282, 285, 45 S. Ct. 82; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 120, 65 L. ed. 165, 169, 41 S. Ct. 45. Cf. Hans Rees' Sons v. North Carolina, 283 U. S. 123, 129 et seq., 75 L. ed. 879, 898, 51 S. Ct. 385. The act as construed below does not violate the commerce clause."

It is pointed out to the Court that the Matson Navigation Company was a domestic corporation engaged in intrastate, interstate and foreign commerce. This Court stated that the tax may not be imposed on a corporation engaged exclusively in interstate and foreign business. The Court held:

> "Appellants insist that by enforcement of the tax in question the State would deny them the equal protection of the laws. They say: The tax is on the doing of business; it would be void if imposed on the doing of interstate and foreign business and can only be upheld as to intrastate business. Many corporations subject to the tax do only the latter. Others do both. The basis of the tax imposed on members of the class first mention is *net income* from intrastate business while the basis of that exacted from members of the other class is net income from all business. The act imposes no tax on corporations engaged *exclusively* in interstate and foreign business." (Emphasis supplied)

More recent decisions of this Court which are in point to the case at bar are represented by *North-Western States Portland Cement Company* v. *Minnesota*, 358 U. S. 450, 79 S Ct. 357, 3 L. Ed. 2d 421, 67 A.L.R. 2d 1292. Mr. Justice Clark delivering the opinion of the majority of the Court found the facts as follows:

> "These cases concern the constitutionality of state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State when those activities are *exclusively* in furtherance of interstate commerce. No question is raised in

> either case as to the reasonableness of the apportionment of net income under the State's formulas nor to the amount of the final assessment made. * * *" (Emphasis supplied)

This Court in distinguishing between corporations doing wholly interstate business and corporations doing a combination intrastate and interstate business, cited with approval the following line of cases:

> "On the other hand, it has been established since 1918 that a net income tax on revenues derived from interstate commerce does not offend constitutional limitations upon state interference with such commerce. The decision of William E. Peck & Co. v. Lowe, 247 US 165, 62 L ed 1049, 38 S Ct 432, pointed the way. There the Court held that though true it was that the Constitution provided 'No Tax or Duty shall be laid on Articles exported from any State,' Art. 1, § 9, still a net income tax on the profits derived from such commerce was not 'laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.
>
> . . . At most, exportation is affected only indirectly and remotely.' Id. 247 US at 174, 175. The first case in this Court applying the doctrine to interstate commerce was that of United States Glue Co. v. Oak Creek, 247 US 321, 62 L. ed. 1135, 38 S. Ct. 499, Ann Cas 1918E 748 (1918). There the Court distinguished between an invalid direct levy which placed a burden on interstate commerce and a charge by way of net income derived from profits from interstate commerce. This landmark case and those usually cited as upholding the doctrine there announced, i. e., Underwood Typewriter Co. v. Chamberlain, 254 US 113, 65 L. ed. 165, 41 S.

Ct. 45 (1920), and Memphis Natural Gas Co. v. Beeler, 315 US 649, 86 L. ed. 1090, 62 S. Ct. 857 (1942), dealt with corporations which were domestic to the taxing State (United States Glue Co. v. Oak Creek (US) supra), or which had 'established a commercial domicile' there, Underwood Typewriter Co. v. Chamberlain (US) and Memphis Natural Gas Co. v. Beeler (US) both supra."

This Court found that such a condition was not controlling but went on to state the Court's past position as follows:

"* * * These cases stand for the doctrine that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs. In fact, in Bass, Ratcliff & Gretton the operations in the taxing State were conducted at a loss, and still the Court allowed part of the overall net profit of the corporation to be attributed to the State. A reading of the statute in Norfolk & W. R. Co. reveals further that one facet of the apportionment formula *was specifically designed to attribute a portion of the interstate hauls to the taxing State.*" (Emphasize supplied)

One of the most recent decisions of this Court was decided on June 8, 1964, in the case of *General Motors Corporation* v. *Washington*, 377 US 436, 84 S Ct. 1564, 12 L. Ed. 2d 430. This Court found the facts to be as follows:

"This appeal tests the constitutional validity, under the Commerce and Due Process Clauses, of Washington's tax imposed upon the privilege

> of engaging in business activities within the State. The tax is measured by the appellant's *gross wholesale sales* of motor vehicles, parts and accessories delivered in the State. Appellant claims that the tax is levied on *unapportioned gross receipts* from such sales and is, therefore, a tax on the privilege of engaging in interstate commerce; is inherently discriminatory; results in the imposition of a multiple tax burden; and is a deprivation of property without due process of law. * * *"

In setting forth the Court's past position in such matters, it was stated:

> "We start with the proposition that '[1] It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.' *Western Live Stock* v. *Bureau of Revenue*, 303 US 250, 254, 82 L ed 823, 827, 58 S Ct 546, 115 ALR 944 (1938). 'Even interstate business must pay its way,' *Postal Telegraph-Cable Co.* v. *Richmond*, 249 US 252, 259, 63 L ed 590, 595, 39 S Ct 265 (1919), as is evidenced by numerous opinions of this Court. For example, the Court has approved property taxes on the instruments employed in commerce, *Western Union Telegraph Co.* v. *Attorney General*, 125 US 530, 31 L ed 790, 8 S Ct 961 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 US 18, 35 L ed 613, 11 S Ct 876, (1891); on profits derived from foreign or interstate commerce by way of a net income tax, *William E. Peck & Co.* v. *Lowe*, 247 US 165, 62 L ed 1049, 38 S Ct 432 (1918), and *United States Glue Co.* v. *Oak Creek*, 247 US

321, 62 L ed 1135, 38 S Ct 499 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, *Underwood Typewriter Co.* v. *Chamberlain*, 254 US 113, 65 L ed 165, 41 S Ct. 45 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, 'the process of manufacturing resulting in no profits until it ends in sales,' *Bass, Ratcliff & Gretton, Ltd.*, v. *State Tax Comm'n*, 266 US 271, 282, 69 L ed 282, 287, 45 S Ct 82 (1924); by a personal property tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, *Northwest Airlines, Inc.* v. *Minnesota*, 322 US 292, 88 L ed 1283, 64 S Ct 950, 153 ALR 245 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 US 450, 3 L ed 2d 421, 79 S Ct 357, 67 ALR 2d 1292 (1959); and by franchise tax levied on an express company in lieu of taxes upon intangibles or rolling stock, measured by gross receipts, fairly apportioned, and derived from transportation within the State, *Railway Express Agency, Inc.* v. *Virginia*, 358 US 434, 3 L ed 2d 450, 79 S Ct. 411 (1959)."

It should be pointed out here that this Court distinguished in this particular decision those cases followed by the Supreme Court of Appeals of West Virginia in its decision of July 20, 1965. This Court discussed these particular cases as follows:

> "However, local taxes measured by *gross receipts from interstate commerce* have not always fared as well. Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce. Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 US 157, 170, 98 L ed 583, 593, 74 S Ct 396 (1954); *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 US 326, 346, 30 L ed 1200, 1205, 7 S Ct 1118 (1887). Such burdens would destroy interstate commerce and encourage the re-erection of those trade barriers which made the Commerce Clause necessary. Cf. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 US 511, 521-522, 79 L ed 1032, 1037, 55 S Ct 497, 101 ALR 55 (1935). And in this connection, we have specifically held that interstate commerce cannot be subjected to the burden of 'multiple taxation.' *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, supra, 347 US at 170, 98 L ed at 593. Nevertheless, as we have seen, it is well established that *taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.*" (Emphasis supplied) 377 U. S. 436.

This Court, setting forth the test which every court should apply, stated as follows:

> "* * * For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look

> to the taxpayer's business activities within the State, i. e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. As was said in *Wisconsin* v. *J. C. Penny Co.* 311 U. S. 435, 444, 85 L ed 267, 270, 61 S Ct 246, 130 ALR 1229 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.' " 377 U. S. 436.

This Court found that General Motors maintained a corporate organization and sales operation in the State of Washington; that it had personnel inside the state who operated offices and maintained almost constant contact with its sales outlets; that General Motors had considerable out-of-state personnel who performed in-state activities and that General Motors warehoused its parts in Washington. The Court, after the findings of these facts, held:

> " '[I]t is beyond dispute,' we said in *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 US at 458, 3 L ed 2d at 427, 'that a State may not lay a tax on the "privilege" of engaging in interstate commerce.' But that is not this case. To so contend here is to overlook a long line of cases of this Court holding that an in-state activity may be a sufficient local incident upon which a tax may be based. As was said in *Spector Motor Service, Inc.* v. *O'Connor*, 340 US 602, 609, 95 L ed 573, 578, 71 S Ct 508 (1951), '[t]he State is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State.' This is exactly what Washington seeks to do here and we cannot say that appellant has shown that its

activities within the State are not such incidents as the State can reach. *Norton Co.* v. *Department of Revenue, supra*, 340 US at 537, 95 L ed at 520. Unlike *Field Enterprises, Inc.* v. *Washington*, 47 Wash 2d 852, 289 P2d 1010, affd, 352 US 806, 1 L ed 2d 39, 77 S Ct 55 (1956), citing *Norton, supra*, the Pontiac and Oldsmobile Divisions of General Motors had no branch offices in Washington. But these divisions had district managers, service representatives and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured. We place little weight on the fact that these divisions had no formal offices in the State, since in actuality the homes of these officials were used as corporate offices. Despite their label as 'homes' they served the corporation just as effectively as 'offices.' In addition, the corporation had a Chevrolet branch office and a General Motors Parts Division warehouse in Seattle.

"Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so enmeshed in local connections that it voluntarily paid taxes on various of its operations but insists that it was not liable on others. Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these local incidents were sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution. *Norton Co.* v. *Department of Revenue, supra.*" 377 U. S. 436.

In summary, the Supreme Court of Appeals of West Virginia found that the Baltimore and Ohio Railroad

was doing both an intrastate and an interstate business. That Court found that a privilege tax was imposed upon the net income of the business derived from both intrastate and interstate commerce and that approximately twenty-seven per cent of the railroad's total intrastate and interstate transportation was done in the State of West Virginia. Such Court held that the State of West Virginia could not tax that income of the railroad, any part of which was derived from interstate commerce. The cited cases clearly show that separation of receipts is often impossible as to a unitary corporation and allow a state to tax the net receipts derived from intrastate and interstate commerce so long as such tax is fairly apportioned. The Baltimore and Ohio Railroad is doing a "mixed" type business, therefore, taxable upon a portion of its interstate receipts.

2. Review of the decision of the Supreme Court of Appeals of West Virginia by this Court is imperative because such decision of the Supreme Court of Appeals of West Virginia, if not reversed by this Court, will result in a loss of approximately fifteen million dollars in refunds out of the State's treasury to taxpayers who heretofore paid the tax in issue and will further result in a loss of approximately one and one-half million dollars in revenues, for each and every year hereafter or until the Legislature of West Virginia might amend such statute. As was so aptly pointed out by Justice Clark, with whom Justice Black and Justice Douglas joined in the dissent in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 614:

> "* * * The taxes involved go back thirteen years. It is therefore no answer to Connecticut and

some thirty other states who have similar tax measures that they can now collect the same revenues by enacting laws more felicitously drafted. Because of its failure to use the right tag, Connecticut cannot collect from Spector for the years 1937 to date, and it and other states may well have past collections taken away and turned into taxpayer bonanzas by suits for refund not barred by the respective statutes of limitation."

CONCLUSION

In conclusion, this petition for a writ of certiorari, it is submitted, should be granted for the following reasons:

(1) The Supreme Court of Appeals of West Virginia has misapplied the pertinent and most recent decisions of this Court applying the Commerce Clause of the United States Constitution, and

(2) The decision of the Supreme Court of Appeals of West Virginia has caused a most serious and substantial problem of refund of millions of dollars and loss of revenue of millions of dollars as well as seriously upsetting the administration of the State tax laws.

Respectfully submitted,

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PROOF OF SERVICE

I, Assistant Attorney General Jack M. McCarty, one of the Attorneys for G. Thomas Battle, Tax Commissioner of the State of West Virginia and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of April, 1966, I served copies of the Petition for Writ of Certiorari and Appendices separately presented to the Supreme Court of the United States on the Baltimore and Ohio Railroad Company, a corporation, by mailing a copy in duly addressed envelopes, with first class postage prepaid to its attorneys of record, as follows:

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APPENDIX C

U. S. CONSTITUTION

ARTICLE I—Section 8, Clause 3, Commerce Clause:

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

WEST VIRGINIA STATUTES

Chapter 11, Article 12A. Privilege Tax On Certain Carrier Corporations

Section 1. Definitions.—

* * *

The term "ton-mile" shall be a unit of transportation meaning transportation of one net ton in weight a distance of one mile.

* * *

Section 2. Railroad Corporations.—Every railroad corporation doing business in the State shall pay an annual privilege tax for each calendar year for the privilege of doing business in the State. The tax shall be five-tenths of one per cent of the value of the total property, tangible and intangible, of the corporation in the State as determined by the assessment made during the calendar year by the board of public works for the purposes of the general property tax.

It is the purpose of this section to levy a privilege tax upon railroad corporations for the privilege of engaging in business conducted entirely within this State, and it is not intended to impose any tax or charge upon interstate or foreign commerce. The return required for purposes of the general property tax shall suffice for purposes of this section.

No public corporation of the State shall levy a license or privilege tax on the business taxed under this section.

* * *

Section 5. Additional Privilege Tax on Net Income of Businesses Included in Preceding Section, and on Railroad Corporations; Computing Tax.—In addition to the tax imposed in the preceding sections, every motor vehicle carrier operating on the public highways of the State and every railroad corporation, railroad car corporation, express corporation or company, pipe line corporation, telephone and telegraph corporation doing business in this State shall pay an annual privilege tax for each calendar year for the privilege of doing business in the State, to be determined as follows:

* * *

(b) The tax as to railroad corporations shall be equal to four per cent of the net income earned within the State, such income to be determined by ascertaining a sum bearing the proportion to total net income of the corporation that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion;

Section 5b. Definitions; Reduction Allowed in Tax Due; How Computed.—When used in this section the phrase "normal tax" shall mean the tax computed by the application of rates against intrastate gross income, pro-rated gross income, assessed value of all property in West Virginia and by pro-rated net income as set forth in sections two, three, four or five [§§ 958 (14)-958 (17)], inclusive, of this article.

When used in this section the term "surtax" shall mean the tax computed by the application of the tax rate as set forth in section five-(a) [§ 958-(17a)] of this article.

When used in this section the phrase "total net balance of taxes due" shall mean the total of the normal tax and surtax less exemption at the rate of fifty dollars annually or at the rate of four dollars and sixteen cents per month for the period actually engaged in business.

For the period commencing July one, one thousand nine hundred forty three and thereafter a reduction of ten per cent of the total net balance of taxes due is allowed. The normal tax shall be computed by the application of rates against intrastate gross income, pro-rated gross income, assessed value of all property in West Virginia, and by pro-rated net income as set forth in sections two, three, four or five, inclusive, of this article. The surtax shall be computed by the application of the tax rate as set forth in section five-(a) of this article. The total net balance of taxes due shall be reduced by the ten per cent credit allowed herein. The total net balance of taxes due reduced by the ten per cent credit is the amount of tax payable.

* * *

Section 6. Annual Return.—The taxpayer under this article shall file an annual return with the state tax commissioner upon a form prescribed by the commissioner setting out the following and such other information as that officer may deem necessary or useful in aid of the assessment and computation of the tax:

(1) The gross income, from all business done within the State, namely, business beginning and ending entirely within the State;

(2) The total gross income of the business wherever conducted;

(3) The net income of the business wherever conducted. For this purpose the determination of net income for purposes of the net income tax due the government of the United States under the laws of the United States shall be taken as final;

(4) The total amount of business done in this State, measured in the units hereinbefore prescribed. The tax commissioner may designate a single month in the tax year as the period for which the amount of business done in this State, measured in the units hereinbefore prescribed, shall be reported and shall fix the total amount of business done in the State for the whole tax year by multiplying the amount determined for the designated month by twelve. For the tax period from the date this act takes effect through December thirty-

first, one thousand nine hundred thirty-three, the tax commissioner may designate any month in that period for purposes hereof:

(5) The total amount of business done, wherever conducted, measured in the units hereinbefore prescribed.

Every return shall be signed and sworn to by the taxpayer, if a natural person, and if a corporation, shall be signed and sworn to by its president, vice president, secretary or principal accounting officer. A return may be made at the same time and as a supplement to the return required for purposes of the general property tax and the tax commissioner may make use of relevant information in both in assessing the tax imposed by this article.

* * *

Section 9. Tax Imposed Is in Addition to Other License Taxes and Charges.—The tax imposed under this article shall be in addition to all license taxes or charges to which the privileges taxed herein are subject under the law of this State. It is the purpose of this article to rest a fair share of the tax burden, commensurate with the benefits received, upon those exercising privileges taxed hereby within this State.